Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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September 15, 2003

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QUESTIONS PRESENTED

This case concerns the application of the Natural Gas Act of 1938 ("NGA") to gas transportation from the Outer Continental Shelf ("OCS"), the largest single source of natural gas production in this country. Under the NGA, the commencement and cessation of the transportation of gas in interstate commerce by natural gas pipelines is subject to the approval of the Federal Energy Regulation Commission ("FERC" or "Commission") as in the public interest through the grant of "certificate" or "abandonment" authorization. This regulatory jurisdiction, and the FERC's regulation of interstate transportation rates, protects the public against the monopoly power of interstate pipelines.

The NGA distinguishes between the narrowly confined local production and gathering of natural gas, which Congress intended to be subject to state jurisdiction, and the transportation of gas in interstate commerce, which is subject to FERC's jurisdiction. On the OCS, where there is no state jurisdiction, producers have invested billions of dollars and connected their producing properties to extensive offshore pipeline systems that were certificated by the FERC as jurisdictional interstate transportation facilities. Producers thereby relied on FERC's ongoing regulation of these pipeline systems under the NGA for protection against the exercise of monopoly power.

The questions presented in this case are:

1. Whether the reclassification of hundreds of miles of jurisdictional natural gas transportation pipeline systems as nonjurisdictional gathering facilities under the new "central-aggregation-point" test applied by the FERC and upheld by the D.C. Circuit is inconsistent with this Court's precedents that the "gathering" exemption from the Commission's jurisdiction over interstate transportation under the NGA must be strictly construed and

"narrowly confined to the physical acts of . . . preparing [gas] for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963).

2. Whether the D.C. Circuit erred in concluding, in direct conflict with the Fifth Circuit, that offshore natural gas pipeline systems previously certificated by the FERC under the Natural Gas Act as jurisdictional transportation facilities in the public convenience and necessity may be reclassified by the Commission as exempt gathering facilities and abandoned by transfer to a nonjurisdictional entity without a finding by the Commission that the public convenience or necessity permits such abandonment.

RULE 29.6 STATEMENT

The petitioners are BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., Exxon Mobil Corporation, Shell Offshore Inc. and Texaco Natural Gas Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner BP America Production Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.

BP Energy Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.
BP America Production Company

Chevron U.S.A. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

ChevronTexaco Corporation
ChevronTexaco Overseas Petroleum Inc.
Chevron Asiatic Limited
Texaco Inc.
TEPI Holdings Inc.
Texaco Exploration and Production Inc.
Chevron U.S.A. Holdings Inc.
Chevron U.S.A. Inc.

Exxon Mobil Corporation states that there are no parent companies or publicly held companies that have a 10% or greater ownership interest in Exxon Mobil Corporation.

Shell Offshore Inc. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

SOI Finance Inc.
Shell U.S. E&P Investments Inc.
Shell Oil Company
Shell Petroleum Inc.
Shell Petroleum N.V.
Royal Dutch Petroleum Company
The "Shell" Transport and Trading Company, p.l.c.

Texaco Natural Gas Inc. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

ChevronTexaco Corporation
ChevronTexaco Overseas Petroleum Inc.
Chevron Asiatic Limited
Texaco Inc.
TEPI Holdings Inc.
Texaco Exploration and Production Inc.
Chevron U.S.A. Holdings Inc.
Chevron U.S.A. Inc.

PARTIES IN THE COURT BELOW

The following parties participated in the appeals of the orders of the Federal Energy Regulatory Commission before the United States Court of Appeals for the District of Columbia Circuit:

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Baltimore Gas and Electric Company
Boston Gas Company
BP America Production Company
BP Energy Company
Brooklyn Union Gas Company
Burlington Resources Oil & Gas Company L. P.
Chevron U.S.A. Inc
Colonial Gas Company
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing and Trade
Energy North Natural Gas, Inc.
Essex Gas Company
Exxon Mobil Corporation
Forest Oil Corporation
KeySpan Gas East Corporation
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Shell Offshore, Inc.
Sunoco, Inc.
Texaco Exploration and Production Inc.
Texaco Natural Gas Inc.

The Houston Exploration Company
TotalFinaElf E&P U.S.A.
Transcontinental Gas Pipe Line Corporation
Williams Gas Processing—Gulf Coast Company, L.P.

The following additional parties participated in the administrative proceedings before the Federal Energy Regulatory Commission:

a. Docket Nos. CP96-206-000 and CP96-207-000

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company, *et al.*
Anadarko Petroleum Corporation
ANR Pipeline Company
Aquila Energy Marketing Corporation
Atlanta Gas Light Company
Ashland Exploration, Inc.
Baltimore Gas & Electric Company
Blue Dolphin Exploration Company
Brooklyn Union Gas Co.
Chevron U.S.A., Inc.
City of Richmond, Virginia
CNG Energy Services Corporation
Coastal Eagle Point Oil Company
Columbia Gulf Transmission Company
Commonwealth Gas Services, Inc.
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Delphi Gas Pipeline Corporation
Dominion Exploration and Production, Inc.
(Formerly CNG Producing Company)
Dominion Transmission, Inc.
Enron Capital & Trade Resources Corporation
Enron Louisiana Energy Company

East Ohio Gas Company
Exxon Corporation
Fina Natural Gas Company
Florida Gas Transmission Company
Gasdel Pipeline System, Inc.
GPM Gas Corporation
High Island Offshore System
Independent Petroleum Association of America
John H. Young, Inc.
Koch Gateway Pipeline Company
Leviathan Gas Pipeline Company
Liquid Energy Corporation
Long Island Lighting Company
Louisiana Land & Exploration Company
Market Hub Partners, L.P.
Mobil Natural Gas Inc.
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Natural Gas Clearinghouse
Natural Gas Pipeline Company of America
New Jersey Natural Gas Company
Niagara Mohawk Power Corporation
NorAm Gas Transmission
North American Resources Company
North Carolina Natural Gas Corporation
North Jersey Energy Associates
Northeast Energy Associates
Northern Natural Gas Company
NUI Corporation
Owens-Corning Fiberglass Corporation
OXY USA Inc.
PanEnergy Gas Services, Inc.
PanEnergy Field Services, Inc.
PECO Energy Company
Penn Fuel Gas, Inc.
Pennzoil Exploration and Production Company

PG Energy Inc.
Philadelphia Gas Works
Phillips Gas Marketing Company
Phillips Petroleum Company
Piedmont Natural Gas Company
Pogo Producing Company
Process Gas Consumers Group
Producer-Marketer Transportation Group[1]
Public Service Commission of the State of New York
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Company
Rochester Gas & Electric Corporation
Sea Robin Pipeline Company
Seagull Marketing Services, Inc.
Shell Offshore, Inc.
Shell West E&P Inc.
South Carolina Pipeline Company
South Jersey Gas Company
Southern Company Services, Inc.
Southern Natural Gas Company
Star Enterprise
Sun Company, Inc.
Superior Natural Gas Corporation
Tejas Power Corporation
Tenneco Energy Inc.
Texaco Natural Gas Inc.
Texas Eastern Transmission Corporation
Transco Municipal Group
Transcontinental Gas Pipeline Co.
Trunkline Gas Company
UGI Utilities, Inc.

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[1] The Producer-Marketer Group comprises Independent Oil & Gas Association of West Virginia, KCS Energy Marketing, Inc. Richardson Products Co., Sid Richardson Oil & Gasoline, Inc. and Valero Natural Gas Company.

UMC Petroleum Corporation
Union Oil Company of California
Union Pacific Fuels, Inc.
U-T Offshore System
Valero Gas Marketing, L.P.
Valero Transmission, L.P.
Vaster Gas Marketing, Inc.
Vastar Resources, Inc.
Virginia Natural Gas, Inc.
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P

b. Docket Nos. CP01-32-000 and CP01-34-000

Amerada Hess Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company
Atmos Energy Corporation
Baltimore Gas & Electric Company
Boston Gas Company
BP America Production Company
BP Energy Company
Burlington Resources Oil & Gas Company
Chevron U.S.A. Inc.
Columbia Gulf Transmission Company
Conoco Inc.
Conoco Gas and Power Marketing
Consolidated Edison Company of New York
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
El Paso Energy Corporation
Enron North America Corporation
Enterprise Oil Gulf of Mexico Inc.

Equiva Services
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
Kerr-McGee Oil & Gas Corporation
KeySpan Energy
Municipal Gas Authority of Georgia
New York Public Service Commission
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Pancanadian Energy Services, Inc.
PECO Energy Company
Phillips Petroleum Company
Piedmont Natural Gas Company, Inc.
Public Service Electric & Gas Company
Shell Offshore, Inc.
Sunoco, Inc.
Superior Natural Gas Corporation
Tennessee Gas Pipeline Company
Texaco Group Inc.
Texaco Natural Gas Inc.
TotalFinaElf E&P U.S.A., Inc.
Transcontinental Gas Pipeline Corporation
United Cities Gas Company
Virginia Natural Gas Company
Washington Gas Light Company
Williams Companies Inc.
Williams Gas Processing—Gulf Coast Company, L.P.

c. Docket Nos. CP01-103-000 and CP01-104-000

Amerada Hess Corporation
Amoco Production Company
Atlanta Gas Light Company
Baltimore Gas & Electric Company

Boston Gas Company
BP America Production Company
BP Energy Company
Brooklyn Union Gas Company dba Keyspan Energy Delivery New York
Chevron, U.S.A. Inc.
Colonial Gas Company
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing & Trade
El Paso Corporation
EnergyNorth Natural Gas, Inc.
Essex Gas
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
KeySpan Gas East Corporation dba KeySpan Energy Delivery Long Island
Motiva Enterprises LLC
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
PECO Energy Company
Piedmont Natural Gas Company, Inc.
Southern Company Services, Inc.
Sunoco, Inc.
Superior Natural Gas Corporation
Texaco Natural Gas Inc.
Transco Municipal Group
United Cites Gas Company
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P.

d. Docket Nos. CP01-368-000 and CP01-369-000

Amerada Hess Corporation
Amoco Production Company
Atlanta Gas Light Company
BP Energy Company
Burlington Resources Oil & Gas Company, L.P.
Chevron U.S.A. Inc.
City of Richmond, Virginia
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing & Trade
Enron North American Corporation
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
KeySpan Delivery Companies
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
PECO Energy Company
Philadelphia Gas Works
Phillips Gas Marketing Company
Phillips Petroleum Company
Piedmont Natural Gas Company, Inc.
Process Gas Consumers Group
Public Service Commission of the State of New York
Public Service Company of North Carolina
Shell Offshore, Inc.
Southern Company Services, Inc.
Superior Natural Gas Company

Texaco Natural Gas Inc.
TotalFinaElf E&P U.S.A. Inc.
Transco Municipal Group
United Cities Gas Company
Virginia Natural Gas Company
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., Exxon Mobil Corporation, Shell Offshore Inc. and Texaco Natural Gas Inc. ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at *Williams Gas Processing-Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) and is reproduced at Petition Appendix (Pet. App. 1a). A previously submitted Petition For A Writ Of Certiorari concerning the D.C. Circuit's opinion is pending before this Court. *Producer Coalition v. FERC*, No. 03-147 (U.S. Sup. Ct.).

Substantially similar issues as presented here also have been raised by previously submitted Petitions For A Writ Of Certiorari, *ExxonMobil Gas Mktg. Co. v. FERC*, No. 02-1265 (U.S. Sup. Ct.), and *Producer Coalition v. FERC*, No. 02-1215 (U.S. Sup. Ct.), arising out of a prior decision of the D.C. Circuit. This decision is published at *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*Exxon Mobil*").

Due to the close relationship between the D.C. Circuit's opinions in this case and *Exxon Mobil*, in tandem review of the Petitions filed with respect to each case is respectfully requested.

The orders of the FERC under review in this proceeding are published as indicated below and are reproduced at Petition Appendix as noted:

1. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP96-206-000 and CP96-207-000, 76 F.E.R.C. (CCH) ¶ 61,317 (September 25, 1996), Pet. App. 21a;

2. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP96-206-001 and CP96-207-001, 95 F.E.R.C. (CCH) ¶ 61,396 (June 14, 2001), Pet. App. 45a;
3. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-103-000 and CP01-104-000, 96 F.E.R.C. (CCH) ¶ 61,118 (July 25, 2001), Pet. App. 60a;
4. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-103-001 and CP01-104-001, 97 F.E.R.C. (CCH) ¶ 61,300 (December 19, 2001), Pet. App. 98a;
5. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-32-000 and CP01-34-000, 96 F.E.R.C. (CCH) ¶ 61,115 (July 25, 2001), Pet. App. 127a;
6. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-32-001 and CP01-34-001, 97 F.E.R.C. (CCH) ¶ 61,296 (December 19, 2001), Pet. App. 168a;
7. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-368-000 and CP01-369-000, 96 F.E.R.C. (CCH) ¶ 61,246 (August 31, 2001), Pet. App. 198a;
8. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-368-001 and CP01-369-001, 97 F.E.R.C. (CCH) ¶ 61,298 (December 19, 2001), Pet. App. 235a.

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction under Section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b). The judgment of the Court of Appeals was entered on June 20, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are Sections 1(b), 4 and 7 of the NGA, 15 U.S.C. §§ 717(b), 717c, and 717f, and are reprinted at Pet. App. 264a-273a.

STATEMENT OF THE CASE

In this case, the D.C. Circuit upheld FERC decisions that reclassified hundreds of miles of jurisdictional natural gas transportation pipelines located on the OCS as gathering facilities exempt from the FERC's jurisdiction under Section 1(b) of the NGA. The result of the reclassification, and the consequent abandonment of facilities and services from interstate service, is to remove FERC authority under the NGA to regulate the rates and terms and conditions of service imposed by pipeline monopolies on the OCS.

The D.C. Circuit's decision is at odds with prior precedent of this Court that strictly construes the production and gathering exemption from FERC jurisdiction under Section 1(b) of the NGA as "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963) ("*Northern Natural*").

The decision below also squarely conflicts with the Fifth Circuit's holding in *Pacific Gas and Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997) ("*Pacific Gas and Electric Co.*"). In the proceedings below, the FERC permitted the abandonment of the previously certificated facilities by approving the transfer of the reclassified facilities to a nonjurisdictional affiliate without the required hearing and finding under Section 7(b) of the NGA that the public convenience or necessity permits the abandonment. The D.C. Circuit affirmed, holding that FERC has no discretion to examine whether or not an abandonment of certificated transportation systems that have been reclassified as gathering facilities is in the public interest. 331 F.3d at 1022,

Pet. App. 18a-19a. In direct contrast, in *Pacific Gas and Electric Co.*, the Fifth Circuit held that FERC may *not* authorize abandonment of reclassified facilities "unless it finds that the 'future public convenience and necessity permit such abandonment.'" 106 F.3d at 1197. On this important issue, there is a direct conflict between the two Courts of Appeal that most often consider cases involving the application of the NGA on the OCS.

The failure of the FERC and the D.C. Circuit to follow the longstanding precedents of this Court and the Fifth Circuit's decision in *Pacific Gas and Electric Co.* has improperly disrupted "a highly complex and long enduring regulatory regime implicating considerable reliance interests of . . . participants in the regulatory process." *California v. FERC*, 495 U.S. 490, 500 (1990). This Court's immediate review is necessary to resolve the conflicts between the D.C. Circuit's decision below and the precedents of this Court and the Fifth Circuit, to prevent the destruction of producers' significant reliance interests and to restore certainty over the extent of FERC's jurisdiction and regulatory oversight over natural gas transported from the OCS.

A. The NGA Provisions.

Congress enacted the NGA to create a comprehensive regulatory scheme of dual federal and state authority, with FERC regulation broadly supplementing the narrow areas of local concern that had been recognized as properly subject to state authority. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1972). Section 1(b) of the NGA provides FERC with jurisdiction over "the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . and . . . natural-gas companies engaged in such transportation or sale." As relevant here, Section 1(b) excludes from the primary grant of FERC jurisdiction and preserves for the exercise of state authority "the production or gathering of natural gas." 15 U.S.C. § 717(b).

Section 4 of the NGA provides for rate regulation of activities subject to the FERC's jurisdiction. It mandates that "[a]ll rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable." 15 U.S.C. § 717c(a).

Section 7 of the NGA grants FERC authority over both the commencement and the cessation of jurisdictional activities. Section 7(c) provides that no natural gas company "shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof" without "a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." *Id.* § 717f(c). Section 7(b) of the Act provides that no natural gas company shall "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing," and without "a finding by the Commission . . . that the present or future public convenience or necessity permits such abandonment." *Id.* § 717f(b). Thus, a natural gas company may not commence transmission of natural gas in interstate commerce unless and until the FERC makes a finding that such action serves the "public convenience and necessity," nor may the company cease such activity absent a similar finding.

B. Factual Background.

1. Producer Reliance on the Existing Regulatory Scheme.

The OCS in the Gulf of Mexico is the largest single domestic source of current natural gas production, and will be an important source of new development and production necessary to serve the future energy requirements of this

country. *See Gas Pipeline Facilities And Services On The Outer Continental Shelf*, 74 F.E.R.C. (CCH) ¶ 61,222, 61,752 n.5 (1996) ("*OCS Policy Statement*"). As the FERC has recognized, natural gas production on the OCS has been developed, to a large extent, by producers in "reliance on the existing regulatory scheme for access to reasonably priced transportation and protection against market power by interstate pipelines." *Id.* at 61,757.

Most of the pipeline facilities at issue in the proceedings below were previously certificated by the FERC under Section 7(c) of the NGA as jurisdictional transportation facilities. 331 F.3d at 1015, Pet. App. 5a-7a. Consequently, such facilities and the transportation services provided by the facilities were subject to FERC's regulatory oversight, including rate regulation pursuant to Section 4 of the NGA.

Certification of the facilities pursuant to Section 7(c) dedicates the pipeline facilities and services provided by the facilities to the interstate market and "create[s] a federal obligation to serve the interstate market until abandonment authorization ha[s] been obtained" pursuant to Section 7(b) of the NGA. *California v. Southland Royalty Co.*, 436 U.S. 519, 526 (1978). Under Section 7(b), "the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interests 'will in no way be disserved' by abandonment." *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325, 1328 (D.C. Cir. 1973), *quoting Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 214 (D.C. Cir. 1960).

2. The 1996 Abandonment Application And Petition.

On February 21, 1996, Transcontinental Gas Pipe Line Corporation ("Transco") filed an application at FERC for an order authorizing the abandonment of all of its offshore facilities in the Gulf of Mexico, as well as various onshore facilities, by sale to its affiliate, Williams Gas Processing—Gulf Coast Company, L.P., ("WGP"). Concurrent with

Transco's request to abandon the offshore pipelines to WGP, WGP filed a petition requesting a declaratory order that the facilities are nonjurisdictional gathering facilities exempt from the Commission's jurisdiction under Section 1(b) of the NGA. Transco and WGP thereby sought to eliminate FERC's regulatory authority and rate regulation over the 3,100 miles of pipeline systems at issue. 331 F.3d at 1015, Pet. App. 5a-7a. These extensive facilities are depicted on the map set forth at Pet. App. 274a.

On September 25, 1996, the Commission dismissed Transco's 1996 abandonment application and petition. *Transcontinental Gas Pipe Line Corp.*, 76 F.E.R.C. (CCH) ¶ 61,317 (1996), Pet. App. 21a, *reh'g denied*, 95 F.E.R.C. (CCH) ¶ 61,396 (2001), Pet. App. 45a. The Commission stated that the "dismissal is without prejudice, however, to Transco's and WGP's filing another proposal requesting that the Commission consider discrete portions of the facilities which were the subject of the instant proceedings to be gathering . . . ." *Id.* at 62,543, Pet. App. 34a.

3. Subsequent Abandonment Applications And Petitions.

On November 20, 2000, Transco filed an abandonment application requesting authority to transfer Transco's North Padre Island ("NPI") and Central Texas ("CT") facilities to WGP. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the NPI and CT facilities. The petition and application were approved without modification. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,115 (2001), Pet. App. 127a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,296 (2001), Pet. App. 168a. Maps depicting the NPI and CT facilities declared to constitute gathering and abandoned as proposed by Transco and WGP are set forth at Pet. App. 275a and 276a, respectively.

On March 12, 2001, Transco filed an abandonment application requesting authority to abandon by transfer to WGP,

Transco's North High Island ("NHI") and West Cameron ("WC") facilities. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the NHI and WC facilities. This petition and application were approved in part as to the NHI facilities and denied as to the WC facilities. A map depicting the NHI and WC facilities proposed by Transco and WGP to constitute gathering is set forth at Pet. App. 277a. The map also identifies the point of demarcation at NHI Block 10 between the upstream facilities declared by FERC to constitute gathering and the downstream facilities that remain transmission. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,118 (2001), Pet. App. 60a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,300 (2001), Pet. App. 98a.

Finally, on May 18, 2001, Transco filed an abandonment application requesting authority to abandon by transfer to WGP Transco's Central Louisiana ("CL") facilities. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the CL facilities. This petition and application were approved in part. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,246 (2001), Pet. App. 198a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,298 (2001), Pet. App. 235a. A map depicting the CL facilities proposed by Transco and WGP to be reclassified as gathering is set forth at Pet. App. 278a. The map also identifies the point of demarcation at Vermilion Block 67 between the upstream facilities in the OCS declared by FERC to constitute gathering and the downstream facilities that remain transmission.

In each of the Commission's orders, the Commission purported to apply its primary function test[1] and selected as a

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[1] *Transcontinental*, 97 F.E.R.C. at 62,384, Pet. App. 181a-183a; 97 F.E.R.C. at 62,398 Pet. App. 248a-251a; 97 F.E.R.C. at 62,411, Pet. App. 111a-114a. As explained by the D.C. Circuit, "since 1983, FERC has used a multi-factor "primary function test" to determine" whether onshore facilities are "devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has

demarcation point between upstream gathering and downstream transmission the point on each offshore lateral system where all or essentially all offshore facilities had converged at a central point offshore. Specifically, the Commission selected the following points on each of the offshore laterals:

NPI—North Padre Island Block 956 [2]
CT—Brazos Block 538 [3]
NHI—North High Island Block 10 [4]
CL—Vermilion Block 67.[5]

As a result, about 466 miles of offshore pipeline systems upstream from the demarcation points were reclassified as nonjurisdictional gathering facilities.[6]

In reaching these conclusions, the Commission rejected the argument that Transco had failed to demonstrate, as required by Commission policy, changed circumstances that would warrant a departure from the Commission's prior determi-

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been collected-interstate transportation." 331 F.3d at 1014, Pet. App. 3a, *citing Conoco Inc. v. FERC*, 90 F.3d 536, 543 (D.C. Cir. 1996). FERC later "modified" the primary-function-test to apply on the OCS and subsequently "reformulated" the primary function test to feature the central-aggregation-point test for offshore systems. *Id.*

[2] *Transcontinental*, 96 F.E.R.C. at 61,440-41, Pet. App. 157a-162a. *See* Map at Pet. App. 275a.

[3] *Transcontinental*, 96 F.E.R.C. at 61,440-41, Pet. App. 157a-162a. *See* Map at Pet. App. 276a.

[4] *Transcontinental*, 96 F.E.R.C. at 61,458-59, Pet. App. 85a-90a. *See* Map at Pet. App. 277a.

[5] *Transcontinental*, 96 F.E.R.C. at 61,976-77, Pet. App. 224a-230a. *See* Map at Pet. App. 278a.

[6] The following pipeline systems were reclassified as gathering: 22 miles of pipeline upstream from NPI Block 956 (*Transcontinental*, 96 F.E.R.C. at 61,431); 270 miles of pipeline in CT upstream from Brazos Block 538 (*Id.*); 111 miles of pipeline upstream from NHI Block 10 (*Transcontinental*, 96 F.E.R.C. at 61,458) and 63 miles of offshore pipeline in CL upstream of Vermilion Block 67 (*Transcontinental*, 96 F.E.R.C. at 61,976-77). The Commission determined there was no central-aggregation-point on the WC system and, accordingly, concluded that the entirety of the system is transmission. *Transcontinental*, 96 F.E.R.C. at 61,459-60, Pet. App. 87a-92a.

nation that the primary function of the subject facilities was transmission. In the Commission's view, Transco's restructuring under the FERC's Order No. 636 [7] provided a change in circumstances that warranted a reclassification of the pipeline facilities as nonjurisdictional gathering facilities.[8] The Commission acknowledged, however, that the subject facilities were previously certificated as jurisdictional facilities pursuant to Section 7(c) of the NGA and that Transco's business purpose was the interstate transportation of gas. The Commission further concluded that once it had found these pipeline systems to be gathering facilities, it had no discretion to reject Transco's application to abandon the facilities by sale to its affiliate or to regulate the rates or terms and conditions over the reclassified and abandoned pipeline systems.[9]

4. The D.C. Circuit's Decision Below.

On review, the D.C. Circuit upheld FERC's determinations. The court held that "petitioners fail to demonstrate that FERC's choices are 'unreasonable and its chosen line[s] of demarcation [are] not within' a 'zone of reasonableness' as

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[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1991-1996] (CCH) ¶ 30,939 (1992). In general, FERC Order No. 636 encouraged pipeline systems to restructure operations by "unbundling" functions included within the traditional multi-function "merchant" role of purchasing, gathering, transporting and re-selling natural gas. Order No. 636 thereby prompted pipelines to attempt to distinguish between, *i.e.* to unbundle, jurisdictional transmission facilities and gathering facilities that had been traditionally bundled as part of pipelines' merchant function. *See* 331 F.3d at 1020, Pet. App. 14a-16a.

[8] *Transcontinental*, 97 F.E.R.C. at 62,383, Pet. App. 178a-181a; 97 F.E.R.C. at 62,410, Pet. App. 108a-111a; 97 F.E.R.C. at 62,397, Pet. App. 245a-248a.

[9] *Transcontinental*, 96 F.E.R.C. at 61,434, 61,442 Pet. App. 140a-143a, 162a-164a; 96 F.E.R.C. at 61,454, 61,460-61,461, Pet. App. 74a-76a, 90a-95a; 96 F.E.R.C. at 61,971, 61,977-61978, Pet. App. 211a-213a, 227a-233a.

distinct from the question of whether the line[s] [are] 'precisely right.'" [10] The D.C. Circuit noted that FERC had "determined that each system featured a central aggregation point demarcating gathering and transmission functions" (331 F.3d at 1015, Pet. App. 6a); that *Exxon Mobil* had upheld FERC's central-aggregation-point test for demarcating gathering and transmission functions (331 F.3d at 1018, Pet. App. 10a-12a); and determined that petitioners had not carried their burden under *Exxon Mobil* to "demonstrate that lines drawn [by FERC] . . . are patently unreasonable, having no relationship to the underlying regulatory problem" (331 F.3d at 1018, Pet. App. 11a).

At no point did the D.C. Circuit justify the radical expansion of the gathering exemption under Section 1(b) of the NGA beyond the narrow confines of the Supreme Court's long-standing definition in *Northern Natural*. Nor did the D.C. Circuit recognize that the failure to follow *Northern Natural* would disrupt the well-entrenched regulatory regime that had developed on the OCS and thereby would threaten to destroy producers' significant property rights and reliance interests. Instead, the D.C. Circuit simply referenced regulatory changes as explaining Transco's efforts to reclassify and abandon pipeline facilities that had been previously certificated as transmission facilities without explaining or even acknowledging the departure from *Northern Natural*. 331 F.3d at 1020, Pet. App. 14a-16a.[11]

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[10] 331 F.3d at 1013 (*quoting Exxon Mobil*, 297 F.3d at 1084) Pet. App. 2a-3a.

[11] The Commission asserted that abandonment was consistent with its unbundling policies of Order No. 636 and "in the long run" should promote competition. *Transcontinental*, 96 F.E.R.C. at 61,434-35, Pet. App. 140a-145a; *reh'g denied*, 97 F.E.R.C. at 62,381, Pet. App. 173a-175a; 96 F.E.R.C. at 61,971, Pet. App. 211a-213a, *reh'g denied*, 97 F.E.R.C. at 62,395, Pet. App. 240a-243a; 96 F.E.R.C. at 61,454, Pet. App. 74a-76a, *reh'g denied*, 97 F.E.R.C. at 62,408, Pet. App. 103a-106a.

Finally, the D.C. Circuit rejected Petitioners' contention that even if the facilities are properly classified as gathering, the NGA required FERC to make a public interest finding before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate pursuant to Section 7(b) of the NGA. *See* 331 F.3d at 1021, Pet. App. 16a-18a. Although the D.C. Circuit acknowledged the Fifth Circuit's contrary holding in *Pacific Gas & Electric Co. v. FERC*, the D.C. Circuit held that FERC had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering:

> We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

331 F.3d at 1022, Pet. App. 19a.

The D.C. Circuit's decision below was "instructed" (331 F.3d at 1013, Pet. App. 2a) by a D.C. Circuit decision issued by another panel in *Exxon Mobil*. *In Exxon Mobil*, a divided court upheld FERC decisions concerning the Sea Robin offshore pipeline system that, like the FERC decisions in this case, reclassified hundreds of miles of pipelines from jurisdictional transportation facilities to nonjurisdictional gathering facilities. Judge Edwards issued a strong dissenting opinion in *Exxon Mobil*, describing the court's validation of FERC's orders as reclassifying a "massive pipeline complex (438 miles overall)" (297 F.3d at 1089) as gathering and "unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*" 297 F.3d. at 1093.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has decided that the FERC may interpret and apply the NGA in a manner that is in direct conflict with

precedent of this Court and the Court of Appeals for the Fifth Circuit. Following a divided panel's majority decision in *Exxon Mobil*, the D.C. Circuit below affirmed FERC's use of a "central-aggregation-point" test for distinguishing between facilities that are used for "the transportation of natural gas in interstate commerce," which are subject to FERC's jurisdiction, and those used for "gathering," which are not. In this case, the result of the application of the "central-aggregation-point" test is that hundreds of miles of pipeline systems previously certificated under Section 7(c) as facilities constructed or operated for the jurisdictional transportation of natural gas—and therefore subject to the just and reasonable rate protections under Section 4—have been reclassified as nonjurisdictional gathering facilities. Consequently, offshore producers of natural gas have been directly exposed to the monopoly power of interstate pipelines, the precise problem that the NGA was enacted to address. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

The D.C. Circuit's decision below also conflicts with the Fifth Circuit's decision in *Pacific Gas and Electric Co.* as the court itself acknowledged, and also contradicts the requirements of Section 7(b) of the NGA. The decision below recognized that the reclassified pipeline facilities previously had been certificated as transportation facilities pursuant to Section 7(c) of the NGA (331 F.3d at 1015, Pet. App. 5a-7a), but the Court refused to require—or even allow—FERC to make a public interest finding pursuant to Section 7(b) before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate. 331 F.3d at 1022, Pet. App. 18a-19a. In *Pacific Gas and Electric Co.*, on direct contrast, the Fifth Circuit held that FERC *must* act as required by Section 7(b) to ensure the public convenience and necessity with respect to the abandonment of certificated facilities that have been reclassified as gathering facilities.

This Court's resolution of the proper application of the NGA to offshore pipelines is of extraordinary importance.

The "central-aggregation-point" test affirmed by the D.C. Circuit in this case and in *Exxon Mobil* dramatically inflates the scope of the production and gathering exemption under Section 1(b) of the NGA beyond any resemblance to the standard set forth by *Northern Natural* and other precedents of this Court. Application of the "central-aggregation-point" to other pipeline systems on the OCS would result in the reclassification of other OCS pipeline systems from NGA-certificated transportation facilities to nonjurisdictional gathering facilities, and the subsequent abandonment of such pipeline systems and avoidance of NGA regulation by transfer of the facilities to a nonjurisdictional affiliate. Under such circumstances, unless FERC acts to ensure the public convenience and necessity pursuant to Section 7(b) of the NGA, as *required* by the Fifth Circuit in *Pacific Gas and Electric Co.*, but *foreclosed* by the D.C. Circuit in this case, producers of natural gas on the OCS will be exposed to the market power of interstate pipelines and their affiliates and to their demands for monopolistic rates.

The OCS is critical to meeting this nation's future energy requirements. In 1996, the FERC recognized that "[t]he Gulf of Mexico is the largest single domestic source of natural gas production, currently representing 27 percent of the lower 48 states' total dry gas production and 17 percent of proven reserves." *OCS Statement of Policy*, 74 F.E.R.C. at 61,752 n.5. By failing to adhere to the strict requirements of the NGA as construed by this Court, the decision below and *Exxon Mobil* have put at risk billions of dollars invested by producers in reliance on the continued regulatory oversight and rate regulation by the FERC over pipeline facilities on the OCS. *See California v. FERC*, 495 U.S. at 499. The importance of the OCS to the nation's energy needs, the significant disruption to further development of the OCS threatened under the D.C. Circuit's decisions below and in *Exxon Mobil*, and the conflicts that exist between the D.C. Circuit's decisions and precedents of this Court and the Fifth Circuit all serve to

underscore the critical need for this Court's immediate review.

I. THE D.C. CIRCUIT'S CONSTRUCTION OF THE GATHERING EXEMPTION FROM FERC'S JURISDICTION UNDER THE NGA CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Gathering Exemption Under Section 1(b) Of The NGA Is Limited To Local Activities That Are Preparatory For The First Stages Of Natural Gas Distribution.

Congress enacted the NGA to create a comprehensive regulatory scheme of dual federal and state authority, with FERC regulation broadly supplementing the narrow areas of local concern reserved to the states. *FPC v. Louisiana Power & Light Co.*, 406 U.S. at 632 (1972); *see also Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 511-12 (1989). Congress intended the NGA "to occupy the field in which the Supreme Court has held that the States may not act." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 185 (1983). By the same token, the exemptions from federal jurisdiction in Section 1(b) were intended to preserve areas of state authority over local matters that had been defined at the time of the NGA's enactment, *i.e.*, "to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act." *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 691 (1947). These Congressional purposes were accomplished by Section 1(b) of the NGA, which both defines matters of primary federal jurisdiction and sets forth "strictly construed" exemptions from the primary grant of federal jurisdiction. *Id.* The production and gathering exemption included in Section 1(b) reserved for the exercise of state authority only such limited control over in-state production activities that was recognized when the NGA was enacted in 1938. *See FPC v. Hope Natural Gas Co.*, 320 U.S. at 613.

At the time of the enactment of the NGA, "areas in which the States [were] constitutionally competent to act" were defined by Supreme Court holdings under the Commerce Clause. *Interstate Natural Gas Co.*, 331 U.S. at 689-90 n.13; *see also FPC v. East Ohio Gas Co.*, 338 U.S. 464, 470-71 nn.10-11 (1950). For example, the distinction in Section 1(b) between jurisdictional "sale[s] in interstate commerce of natural gas for resale" and nonjurisdictional "other . . . sale[s] of natural gas" and "the local distribution of natural gas" reflects Supreme Court cases from the early 20th century that fashioned "a bright line dividing permissible from impermissible state regulation." *Arkansas Electric Cooperative Corp. v. Arkanas Public Service Comm'n*, 461 U.S. 375, 377 (1983). Similarly, in *Interstate Natural Gas Co.*, the Court clarified that the "production and gathering" exemption under Section 1(b) of the NGA applies to the "physical production and gathering of natural gas in the interests of conservation or any other consideration of legitimate local concern." 331 U.S. at 690 (*citing Colorado Interstate Gas Co.*, 324 U.S. 581, 602-603 (1945). *See also Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954). In *Northern Natural*, the Court further specified that the production and gathering exemption under Section 1(b) is "narrowly confined to the physical acts of drawing the gas from the earth and *preparing* it for the *first* stages of distribution." 372 U.S. at 90 (emphasis added). *See also Northwest Central*, 489 U.S. at 511-12 (Section 1(b) of the NGA reserves to the states the long recognized right to regulate production in order to prevent waste and protect the correlative rights of owners).

The distinction in Section 1(b) between nonjurisdictional gathering and jurisdictional interstate transportation reflected limitations on state authority imposed by the "Dormant" Commerce Clause of the Federal Constitution. Consequently, the *Northern Natural* definition of the narrowly confined scope of the production and gathering exemption under Section 1(b) of NGA comports with pre-NGA holdings distin-

guishing between the preparatory gathering of commodities and the subsequent movement of the commodities to interstate markets. In *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926), the Court described timber that was cut and gathered at the banks of the Swamp River in Minnesota for transport over the Swamp River within Minnesota, to the larger downstream Pigeon River at the Minnesota-Ontario border, and then by railroad to Michigan.[12] Similar to the Court's later holding in *Northern Natural* concerning the scope of the gathering exemption in Section 1(b) of the NGA, in *Hughes Bros. Timber Co.* the Court held that "preparatory gathering" ceased with the collection of the cut timber on the banks of the Swamp River, and that interstate transportation commenced when the logs first entered the stream:

> It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp River. The drive in the two rivers, though under the direction of the timber company, *was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself.*

Id. at 475 (emphasis added).

This Court has similarly distinguished between the gathering and interstate shipment of natural gas. In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), the Court observed "it is now well settled" that state authority over local activity related to interstate commerce "is valid if, and only if, the local activity is not such an integral process of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Id.* at 166 (*citing Memphis Natural Gas Co. v. Stone*, 334 U.S. 80, 87 (1948) and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). In *Michigan-Wisconsin*, the Court struck down a Texas attempt to collect a "gathering tax" that was not "levied

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[12] The Swamp River empties into the larger Pigeon River, which forms part of the border between Minnesota and Ontario, Canada. At the mouth of the Pigeon River, the logs were picked up and taken by railroad to the Central Paper Company in Muskegon, Michigan. 272 U.S. at 475.

on the *capture or production* of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing." *Id.* at 169 (emphasis added). Just as the Court in *Hughes Bros. Timber Co.* limited "preparatory gathering" to the collection of logs on the riverbank, the Court's decision in *Michigan-Wisconsin* narrowly construed the meaning of gathering and emphasized that the "gathering tax" at issue applied to the movement of gas that did not constitute "'gathering gas' within the meaning of that term in its ordinary usage." *Id.* at 164; *see also Phillips Petroleum*, 347 U.S. at 678 n.6. The *Michigan-Wisconsin* Court reasoned that the state could not impose a tax downstream of the collection or gathering of gas in its ordinary usage because, as with the interstate transport of cut timber over the Swamp and Pigeon Rivers that followed "preparatory gathering" in *Hughes Bros. Timber Co.*, at such downstream points the "economic process is inherently unsusceptible of division into a distinct local activity . . . and a separate movement in commerce." 347 U.S. at 164. "There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line." 347 U.S. at 167 (*quoting United Fuel Gas Co. v. Hallanan*, 257 U.S. 277, 281 (1921)).

The *Michigan-Wisconsin* Court concluded that "as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of gas from a local outlet of one owner into the connecting interstate pipeline of another." *Id.* at 169. "Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process.'" *Id.* at 169 (*citing Nippert v. City of Richmond*, 327 U.S. 416, 423 (1946)).

The *Michigan-Wisconsin* Court also relied upon *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), where the Court considered whether a state tax on the generation of electricity destined for consumption in interstate markets was a direct burden on interstate commerce in violation of the Commerce Clause. The Court characterized the issue as this:

"[I]s the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce?" *Id.* at 178-79. The Court concluded that the process of generation is "essentially local" and subject to state authority whereas the subsequent transmission of electricity destined to cross state lines is interstate commerce and subject to the paramount authority of the Commerce Clause of the Federal Constitution.

As indicated by *Hughes Bros. Timber Co., Utah Gas* and *Michigan-Wisconsin,* the first collection of natural gas properly falls within the strictly construed production and gathering exemption under Section 1(b) of the NGA, but only to the extent such activity is "essentially local in character and complete in itself; [and not] so linked with transmission as to make it an inseparable part of a transaction in interstate commerce." 286 U.S. at 178-79. Only such discrete, essentially local activities are *preparatory* for the first stages of natural gas distribution within the narrow scope of the Section 1(b) production and gathering exemption defined by *Northern Natural* and the other authorities discussed above.

B. The D.C. Circuit's Application Of The Central-Aggregation-Point Test Does Not Comport With This Court's Prior Construction Of The Gathering Exemption Under Section 1(b) Of The NGA.

Because the D.C. Circuit regarded *Exxon Mobil* as controlling, no effort was made by the D.C. Circuit in this case to reconcile the reclassification of the extensive pipeline systems at issue with applicable precedent of this Court. Indeed, both the FERC's decisions on review and the D.C. Circuit's decision below are *silent* with respect to the *Northern Natural* instruction that pipeline facilities properly within the NGA Section 1(b) production and gathering exemption are "narrowly confined to the physical acts of drawing gas from the

earth and preparing it for the first stages of distribution." 372 U.S. at 90. Nor was any effort made to relate the reclassified facilities to established matters of "local concern" such as "conservation" or "drilling and spacing of wells and the like," as directed by *Interstate Gas Co.*, 331 U.S. at 691, and *Colorado Interstate Natural Gas*, 324 U.S. at 603. And there is no attempt to show that the movement of gas over the reclassified facilities represents a distinctly local collection of gas or a "process essentially local in character and complete in itself," as opposed to "inseparable part[s] of a transaction in interstate commerce, as directed by *Hughes Bros. Timber Co.*, 272 U.S. at 475, *Michigan-Wisconsin*, 347 U.S. at 169, and *Utah Power*, 286 U.S. at 178-79.

To the contrary, under the central-aggregation-point test applied below and in *Exxon Mobil*, gathering is said to end and transmission to begin where two or more segments of an OCS pipeline join for the last time, or nearly the last time, and a single line moves natural gas toward shore. *See Sea Robin Pipeline Co.*, 87 F.E.R.C. (CCH) ¶ 61,384 (1999), *reh'g denied*, 92 F.E.R.C. (CCH) ¶ 61,072 (2000). But the joinder of large pipeline segments on the OCS has nothing to do with the narrow construction of "gathering" under Section 1(b) and the ample precedent of this Court discussed above. Rather, the FERC's "central-aggregation-point" is more plainly understood merely as a point of intersection of pipelines on the mainline pipeline system, where the bulk of production has been aggregated on a single mainline.[13]

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[13] The joinder of pipeline segments is analogous to the confluence of the Swamp River and the larger Pigeon River in *Hughes Bros. Timber Co., supra.* In that case, which addressed the appropriate reach of state authority recognized under the Commerce Clause prior to the enactment of the NGA, the confluence or joinder of a smaller stream into a larger stream "was *not* gathering . . . for subsequent interstate shipment, it *was* the interstate movement itself." 272 U.S. at 475 (emphasis added). The clear analogy between the continuous stream of river transport considered in *Hughes Bros. Timber Co.* and the continuous stream of pipeline transportation considered in the case below demonstrates that the D.C.

Judge Edwards, in his dissenting opinion in *Exxon Mobil*, recognized that the central-aggregation-point test was at odds with *Northern Natural* and that FERC had not provided a rational explanation as to why the central-aggregation-point test determines where gathering ends and transmission begins. As is also true in this case, Judge Edwards correctly concluded that the application of the central-aggregation-point test in *Exxon Mobil* inappropriately expands the definition of gathering far beyond the narrow definition envisioned in *Northern Natural* to encompass a "massive pipeline complex." 297 F.3d at 1089. He observed that aggregation in this sense is far beyond the local collection or gathering of gas from wells in preparation for the first stages of distribution:

> FERC has . . . asked this court to validate a determination that 'gathering' ends where two large lines become one and grow proportionately wider as a result. This proposition is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*, namely that production and gathering entail *only* 'the physical act[] of drawing the gas from the earth and preparing it for the first stages of distribution.'

297 F.3d at 1093 (emphasis added).

Judge Edwards' discussion of the junction of two "forks in the pipeline road" in *Exxon Mobil* is equally applicable to the "forks in the pipeline road" identified as central-aggregation-points in the decisions below. No physical actions take place at these locations that can be characterized as *preparatory* for the first stages of distribution within the meaning of *Northern Natural*. The hundreds of miles of previously certificated transportation facilities upstream from the central-aggrega-

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Circuit's reading of the production and gathering exemption under Section 1(b) exceeds the limited reach of state authority recognized under the Commerce Clause when the NGA was enacted and thus exceeds the scope of the gathering exemption intended by Congress.

tion-points cannot rationally be understood as matters of "local concern" such as "conservation" or "drilling and spacing of wells and the like," as directed by *Interstate Natural Gas* and *Colorado Interstate Gas*. Similarly, the transportation of gas over these extensive pipeline facilities cannot be explained as the distinctly local "preparatory gathering" of gas or a "process essentially local in character and complete in itself" and "separated" from subsequent interstate transportation, as required by *Hughes Bros. Timber Co.*, *Michigan-Wisconsin and Utah Power*. To the contrary, such preparatory acts of distinctly local concern, realistically separate from subsequent downstream transportation of gas, logically can only occur far upstream from the central-aggregation-points identified by the FERC decisions below, much closer to the production platforms where, prior to reclassification of Transco's transmission facilities as gathering, gas was captured and prepared for receipt by and transport in Transco's certificated transportation facilities.

C. The D.C. Circuit Cannot Justify Its Failure To Follow This Court's Interpretation Of The Gathering Exemption Under Section 1(b) Of The NGA.

The D.C. Circuit makes no effort in its decision below to square the Commission's central-aggregation-point with this Court's guidance in *Northern Natural* and the other cases cited above and avoids the issue by reliance on the majority opinion in *Exxon Mobil*. In *Exxon Mobil*, the majority also avoided the import of *Northern Natural* by citing the Fifth Circuit's decision in *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989), which the *Exxon Mobil* majority characterizes as requiring FERC "to recognize that 'the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland.'" 297 F.3d at 1085, *quoting Sea Robin Pipeline Co.*, 127 F.3d at 370. The *Exxon Mobil* majority then cited such "different physical realities" as allowing a change in the scope

of the production and gathering exemption in Section 1(b) of the NGA, because "[w]ords in statutes can enlarge or contract their scope as other changes, in the law or in the world, require their application." 297 F.3d at 1086 (*quoting West v. Gibson*, 527 U.S. 212, 218 (1999)).

But *West* is *not* authority for disregarding or enlarging this Court's prior construction of the production and gathering exemption under Section 1(b) of the NGA. Unlike the well-known Supreme Court precedent that has defined the meaning of the production and gathering exemption under Section 1(b) of the NGA, in *West* there was no prior Supreme Court precedent defining the meaning of the statutory terms at issue.[14]

Neither FERC nor the D.C. Circuit can justify an enlargement of the production and gathering exemption beyond that defined by the prior precedent of this Court. "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."[15] Thus, "the Court's interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent."[16]

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[14] *West* involved the construction of the meaning of the words "appropriate remedies" in Section 717(b) of Title VII of the Civil Rights Act of 1964, which addresses the enforcement of the basic Federal Government employment anti-discrimination standard in Section 717(a). *West* holds that "appropriate remedies" may include compensatory damages even though Section 717(b) does not explicitly refer to compensatory damages. 527 U.S. at 219. The Court noted that the word "including" in the statute makes clear that the Congressional authorization is not limited to the specific remedies there mentioned. *Id.*

[15] *Neal v. United States*, 516 U.S. 284, 295 (1996). *See also California v. FERC*, 495 U.S. at 499 ('considerations of *stare decisis* have special force in the area of statutory interpretation') (*quoting Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

[16] *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (citing Neal). *See also Lechmere, Inc. v. Nat'l Labor*

Further, contrary to the faulty reasoning of the majority in *Exxon Mobil*, and the reliance on *Exxon Mobil* by the D.C. Circuit in this case, regulatory changes in the natural gas industry cannot provide a justification for the FERC to enlarge the scope of the gathering exemption by reclassifying previously certificated transportation facilities as nonjurisdictional gathering facilities. "(I)t is well settled that . . . the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. at 684. Just as subsequent decisions of the Supreme Court do not affect the jurisdiction of the Commission as fixed by the NGA and interpreted by the Court, subsequent policy determinations by the FERC such as unbundling under Order No. 636 cannot alter the scope of the Commission's jurisdiction from that set by the NGA and defined by the Court. The jurisdictional reach of the FERC as expressed in Section 1(b) of the NGA is fixed by the intent of Congress in 1938 as expressed in the NGA and interpreted by this Court, and can not be altered by later regulatory initiatives. *See also Maislin Industries*, 497 U.S. at 135-36.

In sum, the authorities are clear that Congress structured Section 1(b) of the NGA to grant broad jurisdictional authority to FERC, excepting only such local matters that had been recognized as subject to State authority consistent with this Court's construction of the Commerce Clause. The D.C. Circuit's decision below and in *Exxon Mobil* improperly expand the production and gathering exemption intended by Section 1(b) of the NGA, as interpreted by this Court, and thereby unlawfully curtail the scope of federal authority that Congress

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Relations Bd., 502 U.S. 527, 536-37 (1992) and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (agencies are entitled to no deference to depart from Supreme Court interpretations of statutory terms).

intended to put in place under the NGA. As Judge Edwards correctly stated in *Exxon Mobil*, application of FERC's central-aggregation-point test for demarcating gathering from transmission facilities on the OCS is unlawful under *Northern Natural*.

II. THE D.C. CIRCUIT'S CONSTRUCTION OF THE ABANDONMENT PROVISIONS OF THE NGA IS IN DIRECT CONFLICT WITH PRECEDENT OF THE FIFTH CIRCUIT AND IS CONTRARY TO THE STATUTORY REQUIREMENT THAT NO CERTIFICATED FACILITIES OR SERVICE MAY BE ABANDONED UNLESS APPROVED BY FERC AS IN THE PUBLIC CONVENIENCE AND NECESSITY

Beyond its unlawful expansion of the gathering exemption under Section 1(b) of the NGA, the D.C. Circuit compounded its error by allowing an abandonment of the reclassified pipeline systems by sale to a nonjurisdictional affiliate without ensuring the protection of the public interest as required by Section 7(b) of the NGA. The D.C. Circuit's failure to determine whether the public interest would be served is in direct conflict with a ruling by the Fifth Circuit that the FERC *must* ensure the public interest is not disserved before allowing abandonment.

Section 7 of the NGA provides the FERC with jurisdiction over both the commencement of jurisdictional service and the cessation of jurisdictional service. Under Section 7, FERC has the authority and responsibility to "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." *California v. Southland Royalty Co.*, 436 U.S. at 524. Under NGA Section 7(b), the Commission may approve the abandonment of certificated facilities and services *only* upon a showing that abandonment will serve the public interest. *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d at 1328; *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d at 214.

In this case, essentially all of the pipeline facilities reclassified as gathering were subject to certificates issued by FERC pursuant to NGA Sections 7(c) and (e).[17] But the Commission and the D.C. Circuit ignored the requirements of Section 7(b), and the affirmative showing by Petitioners that abandonment was anti-competitive and not in the public interest, by allowing Transco to abandon the reclassified pipeline systems by selling the systems to a nonjurisdictional corporate affiliate with *no* showing that the "public convenience or necessity" permits abandonment. Specifically, the D.C. Circuit held that "FERC properly determined that under NGA section 7(b) it had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering." 331 F.3d at 1022, Pet. App. 18a.

The D.C. Circuit acknowledged the conflict with the Fifth Circuit on this point:

> We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

Id.

As acknowledged by the D.C. Circuit, the Fifth Circuit in *Pacific Gas & Electric Co.* held precisely the opposite: Under Section 7(b) a pipeline may *not* abandon reclassified gathering facilities, or the jurisdictional services provided by such facilities, without ensuring that the "future public convenience or necessity permit such abandonment." *Pacific Gas & Electric Co.*, 106 F.3d at 1197.

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[17] *See Transcontinental*, 96 F.E.R.C. at 61,429, 61,431, Pet. App.127a-129a, 132a-134a; 96 F.E.R.C. at 61,449, Pet. App. 60a-62a; 96 F.E.R.C. at 61,966, Pet. App. 198a-200a.

As the Fifth Circuit correctly recognized, but the D.C. Circuit below failed to apprehend, the clear language of the NGA permits no exceptions for facilities that are certificated as transportation facilities in the public convenience and necessity, and thereby dedicated to jurisdictional interstate service, but years later are reclassified as gathering facilities. Further, Petitioners are aware of no precedent of this Court that can be construed to permit an exception to the statutory requirements for certificated transportation facilities that are subsequently reclassified as gathering. To the contrary, the Court has stated that Section 7(b) "simply does not admit of *any* exception to the statutory procedure." *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979) (emphasis added).[18] Simply stated, certification of jurisdictional transportation facilities pursuant to Section 7(c) of the NGA constitutes a dedication to interstate service that cannot be eliminated by a later reclassification of the facilities as non-jurisdictional gathering. Elimination of the interstate dedication can only be accomplished by an abandonment pursuant to Section 7(b) based on a finding that the public convenience and necessity will in no way be disserved by abandonment.

III. RESOLUTION OF THE APPLICATION OF THE NGA TO OFF-SHORE PIPELINES REQUIRES IMMEDIATE REVIEW.

This case is of extraordinary importance and review by this Court is critical. As the FERC has recognized, the OCS now accounts for approximately 27 percent of U.S. natural gas

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[18] The FERC itself previously refused to permit abandonment of certificated facilities that had been reclassified as gathering unless the pipeline carried its burden of showing that abandonment was in the public interest. *See Trunkline Gas Co.*, 67 F.E.R.C. (CCH) ¶ 61,256, 61,859 (1994) ("[B]ecause for each of the facilities which we have determined to be gathering, [the pipeline] applied for and accepted a certificate of public convenience and necessity under section 7(c) to construct and operate the facility, and used the facilities to bundle together gathering and transmission, the latter being a jurisdictional service, abandonment authority is required.").

production and 17 percent of proven reserves.[19] Further, new producing fields must be discovered and developed on the OCS to meet this nation's future energy needs. The decision below has created great uncertainty concerning the application of the NGA on the OCS, destroyed producers' reliance and expectations concerning FERC's ongoing regulatory oversight over monopolistic pipelines on the OCS, and discouraged the investment of the huge sums of capital that are required to discover and develop essential production areas on the OCS.

As this Court previously has instructed, deference must be accorded to "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, 495 U.S. 490, 499 (1990). The D.C. Circuit's departure from this Court's decisions concerning the scope of the gathering exemption under Section 1(b) of the NGA and the D.C. Circuit's disregard of the strict application of the abandonment requirements under Section 7(b) of the NGA improperly disrupt "a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *Id.* at 500. Strict conformance with this Court's interpretations of the NGA is particularly warranted given the billions of dollars of investments made by producers to develop offshore properties in reliance on the ongoing regulation of interstate pipeline transportation on the OCS. *See Payne v. Tennessee*, 501, U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

The FERC itself has recognized the validity of these concerns. In the Commission's *OCS Statement of Policy*, FERC recognized that producers relied on the Commission's regulatory oversight and rate regulation and that elimination of the

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[19] *OCS Statement Policy*, 74 F.E.R.C. at 61,752 n.5.

Commission's oversight would expose the producers to pipelines' monopoly power:

> [P]roducers . . . have relied on regulated interstate pipelines to transport most, if not all, of their gas onshore and may be captive to these pipelines if Commission oversight were suddenly withdrawn.[20]

The FERC also has recognized that regulatory uncertainty will have detrimental effects on the exploration for, and development of, needed new production areas on the OCS.

> [T]he Commission recognizes that such projects are expensive, and would not be undertaken in an atmosphere of regulatory uncertainty. We do not want to employ a policy that might impede exploration and development of these new areas.[21]

But extreme regulatory uncertainty has been created. Under the D.C. Circuit's decision below, the FERC has exceedingly broad discretion to define the scope of the production and gathering exemption under Section 1(b), well beyond the intent of Congress as clearly construed by long-standing decisions of this Court. Moreover, the conflict between the D.C. Circuit and the Fifth Circuit concerning Section 7(b) of the NGA causes additional uncertainty as to whether pipelines must show that the public interest is served by an abandonment of reclassified facilities that were previously certificated pursuant to Section 7(c) of the NGA. These issues will be recurring as additional offshore pipeline systems seek to avoid FERC rate regulation by taking advantage of FERC's expansive central-aggregation-point test for distinguishing between nonjurisdictional gathering systems and jurisdictional interstate transportation facilities.

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[20] *OCS Statement of Policy*, 74 F.E.R.C. at 61,757.

[21] *OCS Statement of Policy*, 74 F.E.R.C. at 61,756.

IV. OBJECTIONS RAISED TO THE PETITIONS FOR CERTIORARI IN *EXXON MOBIL* ARE NOT PRESENT HERE

In *Exxon Mobil*, the Sea Robin offshore pipeline did not seek to abandon any reclassified facilities pursuant to Section 7(b) of the NGA. On this basis, the Brief For The Federal Energy Regulatory Commission In Opposition states that *Exxon Mobil* "does not present any issue of pressing importance regarding FERC's authority to regulate rates for offshore services on the OCS." Brief In Opposition at 10. "[B]ecause Sea Robin has not ceased performing any services subject to FERC's rate regulation, this case is not an appropriate vehicle to determine whether Section 7(b) is triggered when a pipeline ceases performing services that FERC has reclassified." *Id.* at 17.

The Petitioners in *Exxon Mobil* dispute FERC's contentions. But in any event, the considerations raised by the FERC's Brief In Opposition in *Exxon Mobil* are not present here. In this case, Transco *did* seek to abandon the reclassified pipeline systems by transfer to a nonjurisdictional affiliate, and FERC granted the abandonment. Consequently, this case squarely involves a pipeline that has abandoned facilities and services subject to FERC's rate jurisdiction.

CONCLUSION

For the foregoing reasons, the Petitioners request that the Writ of Certiorari be granted and the judgment below reversed.

Respectfully submitted,

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